Supreme Court, U.S.
FILED

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No. 01658 MAY 2 - 2001

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In The

Supreme Court of the United States

MARQUETTE UNIVERSITY,

Petitioner,

v.

DEBBIE A. LAPERTOSA,

Respondent.

On Petition For A Writ Of Certiorari To The Wisconsin Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a defendant in a state court action who is sued by a private university on a promissory note and defends on the basis that she was subjected to harassment and discrimination by members of the faculty and wrongfully expelled from the dental school entitled to a trial by jury as a matter of due process under the Fourteenth Amendment and Seventh Amendment to the Constitution of the United States?

LIST OF PARTIES

DEBBIE A. LAPERTOSA is the Petitioner.

MARQUETTE UNIVERSITY is the Respondent.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Debbie A. Lapertosa, respectfully prays that a writ of certiorari issue to review the decision of the Wisconsin Court of Appeals, District I, dated October 17, 2000 (unpublished) and the denial of the Petition for Review thereof by the Wisconsin Supreme Court dated February 7, 2001.

OPINIONS BELOW

The decision by the Wisconsin Supreme Court dated February 7, 2001 denying the Petition for Review is reprinted at pp. A-12 to A-13 of the Appendix to this Petition. The opinion of the Wisconsin Court of Appeals, District I dated October 17, 2000 is reprinted at pp. A-1 to A-11 of the Appendix to this Petition.

JURISDICTION

The Wisconsin Supreme Court on February 7, 2001 issued its Order denying the Petition for Review and thereby affirming the decision of the Wisconsin Court of Appeals, District I entered on October 17, 2000. The jurisdiction of the United States Supreme Court to review the decision of the Wisconsin Supreme Court is found at 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES

The case involves the Fourteenth Amendment and the Seventh Amendment to the Constitution of the United States and Section 5, Article I of the Wisconsin Constitution.

STATEMENT OF THE CASE

The background of the case is accurately set forth in paragraph 2 of the opinion of the Court of Appeals as follows:

> "Marquette filed the instant action against Lapertosa seeking a money judgment against her when she defaulted on a promissory note issued by the school. Lapertosa executed the promissory note totaling $16,000 to pay her tuition while she attended the School of Dentistry. The note became due, requiring the payment of the entire unpaid balance, including interest and any applicable penalties at Marquette's option, if she defaulted. After being dismissed from Marquette, Lapertosa defaulted by failing to make a single payment on the promissory note. Marquette commenced this action in an effort to recover the amount owed on the note."

Footnote 1 of the opinion outlines:

> "Lapertosa filed a counterclaim asserting, *inter alia*, that Marquette breached its contract with her when its employees conspired to deprive her of her ability to obtain a degree in dental science by wrongfully and unlawfully causing her expulsion."

Marquette brought a Motion for Summary Judgment on its complaint and moved to dismiss Lapertosa's counterclaim. The trial court denied the Motion for Summary Judgment and took under consideration the Motion to Dismiss the Counterclaim. Marquette appealed from the denial of the Motion for Summary Judgment and the Court of Appeals, District I, in the decision dated and filed October 17, 2000 reversed and remanded with direction that the court grant summary judgment. The Court of Appeals decided that Lapertosa could not present a defense " . . . because the *Marquette University School of Dentistry Student Handbook (Student Handbook)* and the *Marquette University School of Dentistry Bulletin (Bulletin)* constituted a contract between Lapertosa and Marquette, and Lapertosa failed to follow the appeal process contained in the handbook and bulletin, its summary judgment motion should have been granted. We agree; therefore, we reverse the trial court's decision."

A Petition for Review was timely filed with the Wisconsin Supreme Court and denied by the order dated February 7, 2001. (A-12) From that order the petitioner now requests this Court to grant her Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

THE WRIT SHOULD BE GRANTED BECAUSE THIS CASE AFFORDS THE UNITED STATES SUPREME COURT AN OPPORTUNITY TO DECIDE WHETHER DENIAL OF A JURY TRIAL IN A STATE COURT ON THE COMPLAINT AND COUNTERCLAIM IS A VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The constitutional floor established by the due process clause of the Fourteenth Amendment to the United States requires a fair trial in a fair tribunal. *Bracy v. Gramley*, 520 U.S. 899, 117 S.Ct. 1793 (1997). Such a fair trial is a basic requirement of due process. *Schad v. Arizona*, 501 U.S. 624, 111 S.Ct. 2491, 115 L.Ed.2d 555, *reh. den.*, 501 U.S. 1777, 112 S.Ct. 28, 115 L.Ed.2d 1109 (1991); *Morgan v. Illinois*, 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992) and *Wilkins v. Bowerson*, 633 F.Supp. 1496, *aff'd*, 145 F.3d 1006, *rehearing and suggestion for rehearing denied* (W.D. Mo. 1996).

If a party is denied a jury trial when entitled to it, obviously she is denied a fair trial in a fair tribunal.

Although to date the Seventh Amendment to the United States Constitution has not been incorporated as a matter of due process within the Fourteenth Amendment to the United States Constitution, it is clear from decisions interpreting the Seventh Amendment that the right to a trial by jury is a paramount right in Anglo American jurisprudence. One Court of Appeals called the right of trial by jury a "fundamental liberty." *Lecates v. Justice of Peace Court 4 of State of Del.*, 637 F.2d 898 (3rd Cir. 1980). The District Court in New York in 1978 in *Bernstein v. Universal Pictures, Inc.*, 79 FRD 59 stated:

> "The right to a jury trial, where it exists, is so central to our system of jurisprudence that abrogation of that right must be regarded as an extreme measure of last resort." 79 FRD at 70.

As recently as January 22, 1998 the United States Court of Appeals for the Seventh Circuit declared in *Kobs v. Arrow Service Bureau, Inc.*, 134 F.3d 893 at 896-898:

> "In *Sibley v. Fulton DeKalb Collection Service*, 677 F.2d 830 (11th Cir. 1982) the court held that a party upon timely demand is entitled to a jury trial in an action for damages under the FDCPA. Id. at 832. The court noted that there are two possible sources of a right of trial by jury for a statutory cause of action. Id. Congress may provide for trial by jury in the statute that creates the claim regardless of whether the claim involves rights and remedies of the type traditionally enforced in a court of law before a jury. Id. Alternatively, if the claim involves rights and remedies of the type traditionally enforced in an action at law,[1] the Seventh Amendment requires that the right of jury trial be preserved. Id."

> "The question then is whether the Seventh Amendment (fn. 1) to the Constitution mandates a jury trial. This analysis involves a determination of whether the rights under the statute are rights that would have been resolved historically at law by a jury or in equity by a judge and whether the relief requested by the plaintiff is traditionally granted by a jury at law or by a judge in equity. *Sibley*, 677 F.2d at 833; see *Curtis*

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[1] Certainly the controversy in the instant case was an "action at law." It involved a dispute over a contract.

v. Loether, 415 U.S. 189, 195-96, 94 S.Ct. 1005, 1009, 39 L.Ed.2d 260. The *Sibley* court found that because the rights under the FDCPA most resemble tort actions for collection abuses which traditionally have been viewed as being resolved at law and because the relief sought is monetary damages which is the traditional form of relief offered in the courts of law, the § 1692k(a)(2) reference to an allowance of damages by the court must be construed to anybody the right of trial by jury. *Sibley*, 677 F.2d at 834.

1. The Seventh Amendment provides that '[i]n suits at common law, when the value of the controversy shall exceed twenty dollars, the right of a trial by jury shall be preserved. * * *

In reaching its decision, the Fourth Circuit relied on the Supreme Court's decision in *Curtis v. Loether*, 415 U.S. 189, 94 S.Ct. 1005, 39 L.Ed.2d 260, which affirmed the Seventh Circuit's decision in *Rogers v. Loether*, 467 F.2d 1110 (7th Cir. 1972). In *Curtis*, plaintiff filed a private enforcement action under Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601, *et seq.*, alleging racial discrimination in housing for which she requested both compensatory and punitive damages. 415 U.S. at 190, 94 S.Ct. at 1006. Defendants demand for a jury trial was denied, and the court awarded the plaintiff no actual damages and $250 in punitive damages. Id. at 191, 94 S.Ct. at 1006-1007. The Seventh Circuit reversed the district court on the jury trial issue and the Supreme Court affirmed in a unanimous decision. Id. The issue was whether a jury trial was required under 42 U.S.C. § 3612(e) which provides that '[t]he court may award to the plaintiff

> actual damages and not more than $1,000 punitive damages.' Finding a constitutional right to a jury trial, the Supreme Court reasoned that a damage action under Title VIII is an action to enforce legal rights, sounding basically in tort, and, more important, that the relief sought, actual and punitive damages, is the traditional form of relief offered in the courts of law. Id. at 195-96, 94 S.Ct. at 1009."

A jury trial should be granted in the absence of strong and compelling reasons to the contrary. *Mesa Petroleum Co. v. Coniglio*, 629 F.2d 1022 (5th Cir. 1980) and *Rhea v. Massey-Ferguson, Inc.*, 767 F.2d 266 (6th Cir. 1985). As long as it appears from the pleadings that there is an issue triable of right by a jury a plaintiff is entitled to a jury trial. *Laskaris v. Thornburgh*, 733 F.2d 260 (3rd Cir. 1984). Every reasonable presumption should be indulged in favor of the right to a jury trial. *Steele v. Brewery & Soft Drink Workers Local 1162*, 432 F.Supp. 369 (N.D. Ind. 1977).

> " . . . the origin of the duty sought to be enforced, whether in statute, contract, or the common law, does not control the seventh amendment's application. The test is not . . . whether the specific claim was itself 'known' to the common law. Rather, it must be asked whether closely analogous rights and remedies were recognized by the common law . . . ." 432 F.Supp. at 372.

The District Court for the Western District of Michigan in 1983 in *Wood v. International Brotherhood of Teamsters Chauffeurs, Warehousemen & Helpers of America, Local 406*, 565 F.Supp. 1011 observed:

> "The right to trial by jury in civil cases is a basic and fundamental feature of the system of federal jurisprudence. The Supreme Court has held that courts should zealously guard against any diminution of this right. *Jacob v. City of New York*, 315 U.S. 752, 452-53, 62 S.Ct. 854, 854-55, 86 L.Ed. 1166 (1942). Indeed, the Supreme Court has held trial by jury to be the 'normal and preferable mode of disposing of issues of fact in civil cases . . . ' and that 'any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.' *Dimick v. Schiedt*, 293 U.S. 474, 485, 55 S.Ct. 296, 300, 79 L.Ed. 603 (1935). As the Supreme Court stated somewhat more recently, '[t]he federal policy favoring jury trials is of historic and continuing strength . . . .' *Simler v. Conner*, 372 U.S. 221-222, 83 S.Ct. 609, 610, 9 L.Ed.2d 691 (1963) . . . ."

Senior District Judge Dumbauld traced the history of the right to trial by jury in *United States of America v. One 1976 Mercedes Benz 280S*, 618 F.2d 453 (7th Cir. 1980). Judge Dumbauld's incisive and thorough opinion warrants lengthy citation:

> "The Seventh Amendment upon which any constitutional right to jury trial in civil cases depends, provides:
>
> > In suits at common law, where the value in controversy shall exceed twenty dollars, *the right of trial by jury shall be preserved*, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law. (Italics supplied)
>
> It should be noted that the Seventh Amendment created no new right to jury trial but merely

preserves the right to jury trial in cases where it was enjoyed under pre-existing law.

This proposition, self-evident from the wording of the Amendment, has been recognized from the beginning in Supreme Court decisions. Perhaps the earliest discussion of the constitutional language was that of the celebrated Justice Joseph Story, sitting in the old Circuit Court for the District of Massachusetts, in *U.S. v. Wonson*, Fed.Cas.No. 16,750, 1 Gall. 5 (1812): 'Beyond all question, the common law here alluded to is not the common law of any individual state, (for it probably differs in all), but it is the common law of England, the grand reservoir of all our jurisprudence.' [28 Fed.Cas. at 750, 1 Gall. 5] The same eminent jurist declared in *Parsons v. Bedford*, 3 Pet. 433, 446-47, 7 L.Ed. 732 (1830): 'The trial by jury is justly dear to the American people. . . . The phrase 'common law', found in this clause, is used in contradistinction to equity, and admiralty and maritime jurisprudence.' Suits 'at common law' were 'suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered; or where, as in the admiralty, a mixture of public law, and of maritime law and equity, was often found in the same suit. . . . In a just sense, the amendment then may well be construed to embrace all suits, which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights' . . .

. . . Our inquiry in the case at bar therefore is a historical investigation, whether under English and American practice, proximately prior to

> December 15, 1971, trial by jury was utilized in civil proceedings *in rem* for enforcement of statutory forfeitures in violation of customs laws or other statutes; or whether, on the other hand, such a proceeding fell within the scope of equity or admiralty, where jury trial was traditionally unavailable . . . " 618 F.2d 453 at 456-457, 458.

After thoroughly tracing the history of Anglo American jurisprudence with respect to the right to trial by jury in cases involving In Rem seizures and admiralty law, Judge Dumbauld concludes that a jury trial was compelled in the case at bar:

> "Regrettably our conclusion may add to the caseload of the federal court system and require additional time in trying forfeiture cases. But ordinarily forfeiture proceedings are instituted in connection with criminal prosecutions arising out of the same transactions, and under modern procedures it should be practicable for the same jury to dispose of the civil and criminal proceedings concurrently and upon the same evidence. The fact that one facet of the case is *in rem* and the other *in personam*, that the burden of proof rests on different parties and is to be determined under a different standard, should cause no confusion if clear and adequate instructions are given by the trial court.
>
> But in any event, mere inconvenience would be insufficient reason for denying a traditional and substantial constitutional right. *Curtis v. Loether*, 415 U.S. 189, 198, 94 S.Ct. 1005, 1010, 39 L.Ed.2d 260 (1974); *Pernell v. Southall Realty*, 416 U.S. 363, 383-85, 94 S.Ct. 1723, 1733-1734, 40 L.Ed.2d 198 (1974); *Goldberg v. Kelly*, 397 U.S. 254, 265-66, 90 S.Ct. 1011, 1019, 25 L.Ed.2d 287 (1970).

Moreover, even as a matter of policy, weight must be given to the time-honored tradition of American commitment to jury trial, extending back to the Continental Congress (and, as was then believed, to the *legale judicium parium* in Magna Carta). Americans reading Blackstone's statement that 'trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law' rejoiced that even greater reverence was accorded to that cherished institution in the future kingless commonwealths of the new world. The strength of this national policy was recognized, as has been seen, by Justice Story, himself an advocate for extensive admiralty jurisdiction, when in *Parsons v. Bedford* he declared: 'The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. . . . One of the strongest objections originally taken against the constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases. As soon as the constitution was adopted, this right was secured by the seventh amendment . . . which received an assent of the people, so general, as to establish its importance as a fundamental guarantee of the rights and liberties of the people.' Jury trial 'ranks high in our catalogue of constitutional safeguards,' according to a more recent defender of democratic institutions, the late Justice Hugo Black. He regarded the jury as 'the constitutional tribunal provided for trying facts in courts of law,' and declared that 'The founders of our government thought that trial of fact by juries . . . was an essential bulwark of civil liberty.' *Toth v.*

> *Quarles*, 350 U.S. 11, 16, 76 S.Ct. 1, 5, 100 L.Ed. 8 (1955); *Berry v. U.S.*, 312 U.S. 450, 453, 61 S.Ct. 637, 638, 85 L.Ed. 945 (1941); *Galloway v. U.S.*, 319 U.S. 372, 397, 63 S.Ct. 1077, 1090, 87 L.Ed. 1458 (1943).
>
> Furthermore, in the particular type of proceeding here involved, the infusion of the earthy common sense of a jury might upon occasion mitigate appropriately the harsh impact sometimes characteristic of *in rem* procedure, as discussed at the outset of this opinion. Both history and policy thus constrain us to conclude that this case must be remanded for jury trial.
>
> Remanded for further proceedings in accordance with this opinion." 618 F.2d 453 at 468-469.

It is axiomatic that in all cases in which "legal" relief is available and "legal" rights are determined, a right to a jury trial is required under the Constitution. *Lorillard v. Pons*, 434 U.S. 574, 98 S.Ct. 866, 55 L.Ed.2d 40 (1978). The relevant inquiry in determining the right to a jury trial is whether the statutes under which the suit is brought creates "legal rights, remedies enforceable in an action for damages in the ordinary courts of law." *United States v. Milwaukee County*, 457 F.Supp. 1009 (E.D. Wis. 1978) quoting from *Curtis v. Loether*, 415 U.S. 189, 194, 94 S.Ct. 1005, 1005-1008, 39 L.Ed.2d 260 (1974).

In *Powers v. Allstate Ins. Co.*, 10 Wis.2d 78, 89, 102 N.W.2d 393, 399 (1960) the Wisconsin Supreme Court held:

> "The right to trial by jury preserved by this provision of our constitution is the right as it

> existed at the time of the adoption of the constitution in 1848. *Campbell v. Sutliff* (1927), 193 Wis. 370, 214 N.W. 374, 53 A.L.R. 771. The power of courts to set aside excessive verdicts and to grant new trials was firmly established even before the adoption of the United States constitution. Ibid. In the early case of *Corcoran v. Harran* (1882), 55 Wis. 120, 127, 12 N.W. 468, the court declared:
>
> 'We must therefore hold that, in actions of tort *as well as contract* where the damages are clearly excessive, the trial judge may either grant a new trial absolutely, or give the plaintiff the option to remit the excess, and in case he does so order the verdict to stand for the residue . . . .' " (Emphasis supplied)

Powers expressly recognizes the right to a jury trial under the Wisconsin Constitution.

An action for damages for breach of contract has been triable by a jury as a matter of right throughout the history of Anglo American and Wisconsin jurisprudence. See *Dilger v. Estate of McQuade*, 158 Wis. 328, 148 N.W. 1085 (1914). Also see *Jansen v. Vils*, 34 Wis.2d 332, 149 N.W.2d 551 (1967); *Reiman Associates, Inc. v. R/A Advertising, Inc.*, 102 Wis.2d 305, 306 N.W.2d 292 (Ct. App. 1981); *Herkert v. Stauber*, 106 Wis.2d 545, 317 N.W.2d 834 (1982); *Entzminger v. Ford Motor Co.*, 47 Wis.2d 751, 177 N.W.2d 899 (1970); *Ganson v. Madigan*, 15 Wis. 144, 82 Am. Dec. 659 (1862); *Beers v. Kuehn*, 84 Wis. 33, 54 N.W. 109 (1893); *Ehrman v. Cook Elec. Co.*, 630 F.2d 529 (7th Cir. 1980) and *Carter Equipment Co. v. John Deere Indus. Equipment Co.*, 681 F.2d 386 (5th Cir. 1982).

As early as 1883 the Wisconsin Supreme Court acknowledged:

> "It is evident that § 5 [Article I] Wisconsin Constitution referred to, was intended to secure the right to trial by jury in civil and not criminal actions. The words in the section 'and shall extend to all cases at law, without regard to the amount in controversy,' clearly limit the provisions of that section to civil actions at law, and exclude the idea that it was intended to apply to criminal actions."
>
> *Bennett v. State*, 57 Wis. 69, 14 N.W. 912 (1883).

In *State v. Hansford*, 219 Wis.2d 226, 580 N.W.2d 171 (1998) Justice Crooks quoted from *Norval v. Rice*, 2 Wis. 17 (1853) as follows:

> "[W]hat greater security can any person have in his life, liberty or estate, than to be sure of not being divested of, or injured in any of these, without the sense of verdict of *twelve* honest and impartial men of his neighborhood? And hence we find the *common law herein* confirmed by Magna Carta." Bacon's Ab., Title "Juries" vol. 5, p. 308 . . . ." 219 Wis.2d at 237.

CONCLUSION

For the foregoing reasons a Writ of Certiorari should issue to the Wisconsin Supreme Court to review the order of February 7, 2001 and the decision of the Court of Appeals, District I of the State of Wisconsin dated October 17, 2000.

Dated at Milwaukee, Wisconsin, this 1st day of May, 2001.

Respectfully submitted,

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COURT OF APPEALS
DECISION
DATED AND FILED

October 17, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-1265

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

MARQUETTE UNIVERSITY,

PLAINTIFF-APPELLANT,

v.

DEBBIE A. LAPERTOSA,

DEFENDANT-RESPONDENT.

Appeal from an order of the circuit court for Milwaukee County: LEE E. WELLS, Judge. *Reversed and cause remanded with directions.*

Before WEDEMEYER, P.J., FINE and CURLEY, JJ.

PER CURIAM. Marquette University (Marquette) appeals from the trial court's order denying its motion for summary judgment, on its claim seeking to enforce a promissory note against a former student, Debbie A. Lapertosa.[1] Marquette argues that case law prevents

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[1] Lapertosa filed a counterclaim asserting, *inter alia*, that Marquette breached its contract with her when its employees conspired to deprive her of her ability to obtain a degree in

Lapertosa from raising a breach of contract defense because the *Marquette University School of Dentistry Student Handbook* (*Student Handbook*) and the *Marquette University School of Dentistry Bulletin* (*Bulletin*) constituted a contract between Lapertosa and Marquette, and Lapertosa failed to follow the appeal process contained in the handbook and bulletin, its summary judgment motion should have been granted. We agree; therefore, we reverse the trial court's decision.

I. BACKGROUND.

Marquette filed the instant action against Lapertosa seeking a money judgment against her when she defaulted on a promissory note issued by the school. Lapertosa executed the promissory note totaling $16,000 to pay her tuition while she attended the School of Dentistry. The note became due, requiring the payment of the entire unpaid balance, including interest and any applicable penalties at Marquette's option, if she defaulted. After being dismissed from Marquette, Lapertosa defaulted by failing to make a single payment on the promissory note.

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dental science by wrongfully and unlawfully causing her expulsion. In its motion for summary judgment, Marquette also sought dismissal of Lapertosa's counterclaim; however, the trial court did not rule on this part of the summary judgment motion, instead taking it under consideration. In its petition for leave to appeal the trial court's decision, which this court granted, Marquette confined its challenge to the trial court's denial of its motion for summary judgment on the complaint. Therefore, we shall not address Lapertosa's counterclaim, or that part of Marquette's summary judgment motion seeking dismissal of her counterclaim.

Marquette commenced this action in an effort to recover the amount owed on the note.

The facts surrounding Lapertosa's academic history at Marquette are complicated. When Lapertosa entered the Marquette University School of Dentistry in August of 1990, all incoming students, including Lapertosa, were given a copy of the *Bulletin* and the *Student Handbook*. The *Bulletin* and the *Student Handbook* set forth the school's rules and regulations including the policy regarding the dismissal of students. The *Bulletin* and the *Student Handbook* also outlined the appeals process for student academic appeals. Lapertosa's signed application for admission to the school indicated that she agreed to abide by all of Marquette's rules and regulations during her enrollment.

Lapertosa began to have academic problems during the fall semester of her sophomore year. During this semester, Lapertosa was absent from school for several weeks after undergoing gallbladder surgery. At the close of the fall semester, Lapertosa received grades of incomplete in three of her classes, a grade of "X" in another class, indicating that she was absent from the final examination, and, finally, in yet another class, a failing grade. After receiving her grades, Lapertosa met with the Associate Dean for Academic Affairs to discuss her academic status. Lapertosa was allowed to meet with the instructors for those courses in which she had received either an incomplete or failing grade to discuss plans for remediation. The Associate Dean also warned her of the serious nature of her academic situation and requested that she meet with him again in mid-February.

During the spring semester of 1992, Lapertosa was again absent from school for an extended period of time after her mother was hospitalized with a serious illness. On April 6, 1992, two-thirds into the spring semester, Lapertosa withdrew from Marquette. Marquette subsequently granted her request to repeat her sophomore year, but informed her that, during the summer term of the following year, she would have to successfully complete the requirements of the course she had failed during the fall semester.

Lapertosa returned to Marquette for the fall semester in 1992. However, at the end of the semester, she missed two final examinations, resulting in an incomplete in one class and a failing grade in the other. Lapertosa also received another incomplete in a third class. She again met with the Associate Dean to discuss her academic progress. Lapertosa claimed that she had been ill during the final exam week, causing her to miss her exams. The Associate Dean advised her to meet with her instructors to determine whether she would be able to remove the grades of incomplete and whether she could remediate the failing grade. The Associate Dean also informed Lapertosa that the Academic Progress Committee would be meeting that week to prepare a report, and that if there were any extenuating circumstances that had affected her performance, she should inform the Committee prior to the meeting.

On January 11, 1993, both the general faculty and the Academic Board met to discuss Lapertosa's academic performance. Three days later, the Dean of the Dental School wrote to Lapertosa informing her that both the Academic Board and the general faculty decided that she should be

dismissed from the School of Dentistry due to her poor academic performance. However, Lapertosa was subsequently able to produce written documentation from her doctor to corroborate her claim that she had been ill during the final exam week. Consequently, Marquette considered her absence during final exams to be an excused absence. Moreover, her failing grade was changed to an "IX" for "incomplete course work and absent from the final examination." But Lapertosa's problems continued.

In February of 1993, the Director of the Division of Clinical Services wrote a memorandum to Lapertosa regarding her absences in two of her clinical "blocks." The Director advised Lapertosa that, in order to move on to her junior year, she was required to successfully complete the two "blocks." In April, another professor again wrote to Lapertosa informing her that she had not yet completed one of the "blocks" due to absenteeism. At the end of the spring semester, Lapertosa again received two grades of incomplete, an IX and an X. Lapertosa enrolled in the summer session which began in May.

On June 3, 1993, the Dean again wrote to Lapertosa informing her that both the general faculty and the Academic Board decided that she should be dismissed from the School of Dentistry because, while repeating her sophomore year, she failed to complete her required course work in a timely fashion. Lapertosa appealed this decision to the Academic Board. The Dean wrote to Lapertosa, informing her that the Academic Board had considered her appeal, but that the Board had voted to uphold its decision that she be dismissed from the School of Dentistry.

Lapertosa then retained the services of an attorney who wrote the school seeking to appeal the Academic Board's decision to dismiss Lapertosa. In his letter, Lapertosa's attorney asserted, "Ms. Lapertosa is currently enrolled in summer school at the School of Dentistry and is midway through her coursework which she has every expectation of successfully completing." Unfortunately, Lapertosa did not do well in summer school.

In August of 1993, the school wrote to Lapertosa regarding her appeal of the Academic Board's most recent decision to dismiss her. In the letter, she was informed that the school could not find "any serious procedural errors in the fashion in which the Academic Board reached its conclusion to dismiss you from the School of Dentistry" and, as a consequence, her appeal was being denied and her dismissal upheld. Nevertheless, Lapertosa's case was referred back to the Dean of the Dental School so that the Academic Board could review her progress in the summer session and reconsider her dismissal when school reconvened in the fall. In September of 1993, Lapertosa received another letter from the Dean of the Dental School informing her that, based on her absenteeism during the summer session, her dismissal was considered final.

The terms of the promissory note Lapertosa had executed with Marquette called for the repayment of the loan nine months after Lapertosa ceased to be at least a half-time student at the School of Dentistry. After nine months passed and the note went into repayment status, Lapertosa failed to make a single payment. Marquette then brought the instant action, seeking a money judgment for the amount of the promissory note. Lapertosa answered

denying that she had defaulted, and arguing that her performance under the promissory note was excused due to Marquette's breach of its contractual obligation. In her answer, Lapertosa claimed that Marquette breached its contract with her by acting in bad faith when its professors and instructors conspired to deprive her of her degree by causing her expulsion from the dental school.

Marquette subsequently moved for summary judgment on its complaint and sought dismissal of Lapertosa's counterclaim. After a hearing on Marquette's motion, the trial court found that Marquette had sufficient reason for dismissing Lapertosa from the School of Dentistry based on her academic performance. However, the trial court theorized that the reason she performed so poorly academically could have been because of her accusations that her instructors engaged in unfair, arbitrary and capricious conduct towards her. The trial court found that this "cloud of facts" made it impossible for the court to grant summary judgment because there was a genuine issue of material fact as to whether Marquette, through its employees, treated Lapertosa arbitrarily and capriciously. Further, the trial court disagreed with Marquette's contention that the *Student Handbook* and the *Bulletin* created a contract, and Lapertosa's failure to follow the procedures outlined in them precluded her from asserting a breach of contract defense based on the alleged arbitrary and capricious conduct of Marquette's employees.

II. ANALYSIS.

Marquette submits that the trial court erred in denying its motion for summary judgment by finding that

Lapertosa's failure to follow the procedures for appealing academic decisions found in the *Student Handbook* and the *Bulletin* did not bar her from asserting a breach of contract defense based on Marquette's arbitrary and capricious actions. Marquette also argues that the trial court erred in denying its motion for summary judgment by finding that Lapertosa's allegations of mistreatment by her instructors created a genuine issue of material fact. As a result, the trial court declared that the reasons Marquette gave for dismissing Lapertosa might not, in fact, be the actual reasons for her dismissal. We agree with Marquette's argument that the *Student Handbook* and *Bulletin* created a contract. Further, we conclude that because Lapertosa failed to follow the academic appeal procedures found in the *Student Handbook* and *Bulletin*, she is precluded from raising a defense to the breach of contract suit.

Our review of a trial court's decision on summary judgment is *de novo*. *See Green Springs Farms v. Kersten*, 136 Wis.2d 304, 315-16, 401 N.W.2d 816 (1987). We follow the same summary judgment methodology as the trial court. *See id.* That methodology has been described in many cases. *See, e.g., Grams v. Boss*, 97 Wis.2d 332, 338, 294 N.W.2d 473 (1980). Therefore, we need not repeat it here, except to say that summary judgment must be granted if the evidentiary material demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Wis. Stat. Rule 802.08(2) (1997-98).[2]

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[2] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

Marquette's complaint alleged that: Lapertosa executed a promissory note for the repayment of various amounts she borrowed from Marquette; the note called for repayment beginning nine months after the date she ceased to be at least a half-time student; a default made the entire principal due and payable at Marquette's option. Further, it pled that once the note went into repayment following her dismissal, she failed to make a single payment, thus defaulting on the note, resulting in her being liable for the principal balance, late fees, and accrued interest in the amount of $17,997.48. Lapertosa answered, denying that she had defaulted, and arguing that Marquette was not entitled to summary judgment because her performance under the promissory note was excused when Marquette, through its professors and instructors, breached its contractual obligations to her by wrongfully conspiring to deprive her of a degree in dental science by arbitrarily and capriciously causing her expulsion from the dental school.[3] In its summary

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[3] Lapertosa alleged several instances of arbitrary and capricious conduct by her instructors. Specifically, Lapertosa asserted that: (1) she went to see one of her instructors regarding a problem she was having with another instructor and he allegedly told her that she might have better success if she sat on the instructor's lap; (2) when the grade that one of her instructors had given her was changed by the Academic Board, the instructor retaliated by refusing to accept the two projects she completed during the semester and requiring her to do two new projects, and only agreeing to give her a written final exam instead of an oral final exam after she protested for months; (3) one of her instructors intentionally failed to record her grades in his master grade book; (4) she was forced to wait hours to have her work checked by her instructors when her classmates waited only ten to fifteen minutes to have their work checked;

judgment submissions, Marquette countered that Lapertosa could not assert a breach of contract defense because the *Student Handbook* and the *Bulletin* created a contract and she failed to follow the appeal procedures in them.

Marquette argues that the facts here are identical to those found in *Cosio v. Medical College of Wisconsin, Inc.*, 139 Wis.2d 241, 245, 407 N.W.2d 302 (Ct.App.1987), and Lapertosa is precluded from raising her breach of contract defense because she failed to follow the appeal procedures set forth in the *Student Handbook* and the *Bulletin*. We agree.

This court has recognized that a school's bulletin or student handbook can create a contractual relationship between the student and the institution. Further, once a contract is created, every contract implies a duty of good faith and fair dealing between the parties and a promise against arbitrary or unreasonable conduct. *See* WIS JI-CIVIL 3044. Our review of the record confirms that a contract was created between Marquette and Lapertosa by the *Student Handbook* and the *Bulletin* when Marquette promised to provide dental instruction and training, and

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(5) when she became suspicious that one of her instructors was not grading her fairly, she tested her suspicion by switching exams with a classmate unbeknownst to the instructor, who, thinking he was grading her classmate's exam, gave her a passing grade, while at the same time giving her classmate a failing grade, thinking he was grading Lapertosa's exam; (6) the same instructor took her property from her assigned work station and withheld it for a week without informing her why; and (7) another instructor purposefully and intentionally downgraded her on a project when certain classmates turned in identical projects but received substantially higher grades.

Lapertosa promised to abide by the rules and regulations at all times during her education and to pay tuition and fees to Marquette.

In *Cosio*, the court stated that a student who does not abide by the rules contained in the contract created by the handbook, by following procedures the handbook establishes to resolve grievances, cannot later complain about the grievances. *See Cosio*, 139 Wis.2d at 244-48 (holding that "the trial court providently granted summary judgment because [ ] no issue of fact is presented relating to [the school's] breach of contract or warranty of good faith because [the defendant] failed to use the remedy provided by contract to" address his complaints). Therefore, Lapertosa is precluded from raising Marquette's alleged breach of contract because she failed to follow the remedies set forth in the *Bulletin* and the *Student Handbook*. Because Lapertosa failed to follow these procedures, she is precluded from asserting that Marquette breached its contract with her based on the alleged arbitrary and capricious conduct of its employees.

Therefore, because under *Casio* Lapertosa's defense based on her breach of contract claims was precluded, Marquette was entitled to summary judgment. We remand this case to the trial court for entry of an order consistent with this decision.

By the Court. – Order reversed and cause remanded with directions.

This opinion will not be published. See Wis. Stat. Rule 809.23(1)(b)5.

[LOGO]

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February 7, 2001

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You are hereby notified that the Court has entered the following order:

No. 99-1265 *Marquette University v. Lapertosa*
L.C.#97CV003667

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of defendant-respondent-petitioner, Debbie A. Lapertosa, and considered by the court,

IT IS ORDERED that the petition for review is denied, with $50 costs.

Cornelia G. Clark
Clerk of Supreme Court